

PUBLIC VERSION

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VERIGY US, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

VERIGY US, INC, a Delaware Corporation,

Plaintiff,

vs.

ROMI OMAR MAYDER, an individual;
WESLEY MAYDER, an individual; SILICON
TEST SYSTEMS, INC., a California Corporation;
and SILICON TEST SOLUTIONS, LLC, a
California Limited Liability Corporation,
inclusive,

Defendants.

Case No. C07 04330 RMW (HRL)

**VERIGY'S NOTICE OF MOTION AND
MOTION FOR SUMMARY
ADJUDICATION OF ITS THIRD AND
EIGHTH CLAIMS FOR RELIEF;
SUPPORTING MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: October 3, 2008

Time: 9:00 am

Ctrm.: 6

Judge: Hon. Ronald M. Whyte

Complaint Filed: August 22, 2007

Trial Date: None Set

AND RELATED CROSS-ACTIONS

DOCUMENT SUBMITTED UNDER SEAL

HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY

PURSUANT TO STIPULATED PROTECTIVE ORDER

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NOTICE OF MOTION AND MOTION

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on Friday, October 3, 2008, at 9:00 a.m., or as soon thereafter as the matter may be heard before the Hon. Ronald M. Whyte, United States District Judge, Courtroom 6 of the United States District Court for the Northern District of California, San Jose Division, 280 South First Street, San Jose, California, plaintiff Verigy U.S., Inc. ("Verigy"), shall and hereby does move the Court for summary adjudication of its third and eighth claims for relief within its Complaint in the above-captioned action.

The motion is made on the grounds that, as to each of the third and eighth claims for relief within Verigy's Complaint, the material facts are not genuinely disputed and Verigy is entitled to judgment as a matter of law.

This motion is based upon this notice of motion and motion, the supporting memorandum of points and authorities, the accompanying declarations of Melinda M. Morton and Amy Price, the complete files and records in this action, and such additional evidence and argument as may hereinafter be presented.

STATEMENT OF ISSUES

(N.D. Cal. Civil L.R. 7-4)

1. Should Verigy obtain Summary Adjudication of its Eighth Claim for Relief against Romi Mayder for breach of the duty of loyalty?

2. Should Verigy obtain Summary Adjudication of its Third Claim for Relief against Romi Mayder under the Computer Fraud and Abuse Act, [18 U.S.C. §1030](#) *et seq.*?

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND BACKGROUND

This case involves the misappropriation of Verigy's valuable trade secrets and confidential information by Romi Mayder, a former Verigy employee, by the new companies he formed, Silicon Test Solutions, LLC ("STS LLC") and Silicon Test Systems Inc. ("STS, Inc.") (collectively, the "STS Entities"), and by Romi Mayder's brother and co-conspirator, defendant Wes Mayder, who invested in both STS Entities, was a member of STS LLC and a board member of STS, Inc.

1 Romi Mayder was a long-term and trusted employee of Verigy and its predecessors-in-
2 interest, Agilent Technologies, Inc. (“Agilent”) and Hewlett Packard Company, who abruptly
3 resigned his employment with Verigy in September 2006 after forming the STS Entities. Mayder’s
4 work for Verigy and its predecessors was to develop an application specific integrated circuit
5 (“ASIC”) called the [REDACTED] Mayder was subject to an Agreement Regarding
6 Confidential Information and Proprietary Developments (“ARCIPD”) at Verigy and its
7 predecessors-in-interest.

8 In or about early June 2006, mere weeks after signing the ARCIPD with Verigy that
9 affirmatively stated that Mayder was not authorized at any time to use or disclose confidential
10 Verigy information or to remove Verigy property from its premises without Verigy’s permission,
11 Mayder began (1) taking steps to form the STS Entities, (2) using Verigy’s confidential information
12 to benefit the STS Entities, and (3) emailing Verigy documents to his home computer, using his
13 Yahoo email account to cover up his activities. Mayder emailed the [REDACTED]
14 [REDACTED] to himself, and by June 12, 2006, he had slightly revised it, done a global
15 search and replace to substitute “Verigy” with “Silicon Test Solutions,” and sent it off to Robert
16 Pochowski, a potential investor who was not a Verigy employee. At least two other times that
17 summer Mayder emailed additional documents to Pochowski without even bothering to make any
18 changes to hide the fact that they were Verigy documents. Mayder also emailed a [REDACTED]
19 [REDACTED] in June 2006 to [REDACTED], two
20 potential suppliers for his independent competing business, all while still employed at Verigy.

21 In early July 2007, Verigy learned that Romi Mayder was marketing a product very similar to
22 Verigy’s technologies and began an investigation to determine whether Romi Mayder was using
23 Verigy trade secrets. Pochowski supplied Verigy with the emails he had received from Romi
24 Mayder, and Verigy discovered that Mayder had emailed and used Verigy documents without
25 authorization, and to advance his own interests.

26 On August 22, 2007, after Verigy’s investigation revealed that Romi Mayder had
27 misappropriated and was using Verigy’s trade secrets, Verigy filed this action and sought a
28 temporary restraining order (“TRO”). The TRO was granted on August 24, 2007 and remained in

1 force until replaced by a five (5) month preliminary injunction granted by this Court on February 29,
 2 2008. (Docket No. 171.) The preliminary injunction was extended for another four (4) months by
 3 subsequent order dated May 20, 2008 which found defendants in contempt of the TRO. (Docket No.
 4 212.)

5 Presently, Verigy moves for summary adjudication of the third and eighth claims for relief in
 6 Verigy's Complaint.

7 **II. STATEMENT OF FACTS NOT GENUINELY DISPUTED**

8 **A. Mayder's Employment with Verigy.**

9 Romi Mayder was continuously employed from June 15, 1998 to September 22, 2006 by
 10 Verigy and its predecessor, Agilent, and became a Verigy employee on June 1, 2006. (Declaration
 11 of Manuel Guerzoni (Docket No. 6) ("Guerzoni Decl."), ¶¶2, 3, Ex. A.) On June 1, 2006, the day
 12 Verigy started operations, an email was sent to all Verigy employees reminding them not to share
 13 confidential company information. (Declaration of Amy Price, ¶ 2, Ex. A.) The email states, *inter*
 14 *alia*:

15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]

18 (*Id.*) The email goes on to define "confidential information" and prohibit its disclosure:

19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED]

27 (*Id.*) Finally, the email states: "[REDACTED]"

28 [REDACTED]

1 [REDACTED]” (*Id.*)

2 Verigy’s Standards of Business Conduct state, in pertinent part, that:

3 All nonpublic information, including financial data and projections, proprietary and
4 technical information, . . . must only be used for company business purposes. You
5 have an obligation to use all reasonable efforts to safeguard Verigy’s nonpublic
6 information. You may not disclose nonpublic information to anyone outside of the
company, except when disclosure is required by law or when disclosure is required
for business purposes and appropriate steps have been taken to prevent misuse of that
information.

7 (*Id.*, ¶ 3, Ex. B (Standards of Business Conduct).)

8 As a condition of his employment with Verigy, Romi Mayder was required to sign, and did
9 sign, an Agreement Regarding Confidential Information and Proprietary Developments (the
10 “ARCIPD”). (Guerzoni Decl., ¶3, Ex. B.) The ARCIPD contains the following pertinent
11 provisions:

12 1. This Agreement concerns trade secrets, confidential business and technical
13 information, and know-how not generally known to the public which will become
14 known to or acquired or produced by me in connection with my employment by
15 Verigy (hereinafter “Confidential Information.”) Confidential Information
16 includes, without limitation, information on Verigy organizations and structure;
17 staffing; finance; strategic plans; information on employee performance,
18 compensation, assignments; information on research and development,
19 manufacturing and marketing; as well as information which Verigy receives from
20 third parties under an obligation of confidentiality. Confidential Information also
includes information of the foregoing types that I received during any period of
employment with Agilent Technologies, Inc., whether such information relates to
Agilent or is or was received from third parties under an obligation of
confidentiality. I agree: (a) to use such Confidential Information only in the
performance of Verigy duties; (b) to hold such Confidential Information in
confidence and trust; and (c) to use all reasonable precautions to ensure that such
Confidential Information is not disclosed to unauthorized persons or used in an
unauthorized manner, both during and after my employment with Verigy.

21 2. This Agreement also concerns inventions or discoveries (whether or not
22 patentable), designs, works of authorship, mask works, improvements, data,
23 processes, computer programs and software (herein called “Proprietary
24 Developments”) that are conceived or made by me alone or with others while I am
25 employed by Verigy or that relate to the research and development or the business
26 of Verigy. Such Proprietary Developments are the sole property of Verigy, and I
agree: (a) to disclose them promptly to Verigy; (b) to assign them to Verigy; and (c)
to execute all documents and cooperate with Verigy in all necessary activities to
obtain patent, copyright, mask works and/or trade secret protection in all countries,
at Verigy US, Inc.’s expense.

27 3. The product of all work performed by me during and within the scope of my
28 Verigy employment including, without limitation, any reports, documents drawings,
computer programs, devices and models, including all copies thereof, will be the

1 property of Verigy and Verigy will have the sole right to use, sell, license, publish
2 or otherwise disseminate or transfer rights in such a work product.

3 4. I will not remove any Verigy property from Verigy premises without Verigy
4 US, Inc.'s permission

5 5. Upon termination of my employment with Verigy, I will return all Verigy
6 property to Verigy unless Verigy authorizes me in writing to retain such property.

7 (*Id.*)

8 Mayder was employed by Verigy as a hardware design engineer in the Memory Test
9 Division. (Declaration of Ira Leventhal in support of Verigy's Ex Parte Application for Temporary
10 Restraining Order, etc. (Docket No. 9) ("Leventhal Decl., August 22, 2007"), ¶ 9.) Mayder's work
11 for Verigy was to develop specifications for an ASIC called the [REDACTED]. (Declaration of
12 Romi Mayder in response to Order to Show Cause (Docket No. 55) ("Mayder Decl., October 11,
13 2007") ¶19; Leventhal Decl., August 22, 2007, ¶ 9.) His responsibilities included developing a
14 request for quote ("RFQ") to be sent to vendors to solicit quotes for designing and manufacturing the
[REDACTED]. (*Id.*)

15 **B. While Employed By Verigy, Mayder Founded STS.**

16 In early June 2006, Mayder contacted Robert Pochowski, a former Agilent executive who
17 was not a Verigy employee, about the possibility of forming a business together. (Mayder Decl.,
18 October 11, 2007, ¶¶23, 28; Declaration of Robert Pochowski in Support of Verigy's Ex Parte
19 Application for a Temporary Restraining Order, etc. (Docket No. 11) ("Pochowski Decl., August 22,
20 2007") ¶ 4.)

21 On June 8, 2006, Mayder met with Pochowski and asked him to invest in a company he was
22 starting called Silicon Test Systems. (Pochowski Decl., August 22, 2007, ¶¶4-6.) On June 15, 2006,
23 Mayder registered the domain name "silicontest.com" with Network Solutions for his new company.
24 (Mayder Decl., October 11, 2007, ¶32; Declaration of Melinda Morton in Support of Verigy's Ex
25 Parte Application for a Temporary Restraining Order, etc. ("Morton Decl., August 22, 2007")
26 (Docket No. 10), ¶3, Ex. A.)) Mayder was the administrator for the website. (Morton Decl., August
27 22, 2007, ¶3, Ex. A.)

28 On September 8, 2006, Silicon Test Solutions, LLC was registered with the California

1 Secretary of State. (*Id.*, ¶7, Ex. D.)

2 **C. While Employed By Verigy, Mayder Used Verigy's Information For the Benefit**
3 **of STS.**

4 In early June 2006, mere weeks after signing the ARCIPD with Verigy that affirmatively
5 stated he was not authorized at any time to use or disclose confidential Verigy information, that
6 Verigy had the sole right to disseminate all work performed by him, and that Romi Mayder was not
7 authorized to remove Verigy property from its premises without Verigy's permission, Romi Mayder
8 began emailing confidential Verigy documents to his home computer, using his Yahoo email
9 account to cover up his activities. (Declaration of Melinda Morton submitted herewith ("Morton
10 Decl.") ¶¶ 2-3, Ex. A (Romi Mayder Depo.Tr., 211-213) and Ex. B (Romi Mayder Depo. Ex. 29).)
11 Among the documents Mayder emailed to himself were [REDACTED]
12 [REDACTED]. (*Id.* and at Ex. A (Romi Mayder Depo Tr., 211-213; 215-221); Declaration of
13 Andrew Lee in support of Verigy's Ex Parte Application for Temporary Restraining Order, etc.
14 (Docket No. 8) ("Lee Decl."), ¶ 6, Ex. A; Morton Decl., August 22, 2007, ¶4, Ex. B and C;
15 Pochowski Decl., August 22, 2007, ¶¶19-20, Ex. I and J.) Mayder revised it slightly, performing a
16 global search and replace to replace "Verigy" with "Silicon Test Solutions." (Morton Decl., ¶ 2, Ex.
17 A (Romi Mayder Depo.Tr., at 215:16-217:16; 218:14-221:5) and Ex. C (Romi Mayder Depo Ex.
18 30.)

19 On June 12, 2006, during his work day for Verigy, Romi Mayder emailed the altered
20 specification to Pochowski, without benefit of a nondisclosure agreement, from his private email
21 account [REDACTED]. (Mayder Decl., October 11, 2007, ¶28; Morton Decl., ¶2, Ex.
22 A (Romi Mayder Depo.Tr., at 211:6-12) and Ex. B (Romi Mayder Depo. Ex. 29); Pochowski Decl.,
23 August 22, 2007, ¶ 7, Ex. A.) Mayder described the document as a first draft [REDACTED]
24 [REDACTED], a potential supplier to STS. (*Id.*) The properties window for the RFQ
25 Mayder sent to Pochowski shows it was an Agilent document. (Pochowski Decl., August 22, 2007,
26 ¶¶18, 19, Ex. I.) The document is virtually identical to a document Mayder created for Verigy. (*Cf.*
27 Pochowski Decl., August 22, 2007, Ex. A *with* Lee Decl., August 22, 2007, Ex. A; *see also* Morton
28 Decl., August 22, 2007, ¶4, Ex. B (a redline comparison of the two documents).) The documents

1 even have the same typographical and grammatical errors. (Morton Decl., August 22, 2007, ¶4.)

2 On June 14, 2006, during his work day for Verigy, Mayder sent Pochowski an email
 3 attaching two documents he described as the [REDACTED] and an updated version of
 4 the technical data sheet Mayder previously sent Pochowski, and asked him to send them to
 5 Peregrine. (Pochowski Decl., Aug. 22, 2007, ¶9, Ex. B.) The first attachment was [REDACTED]
 6 [REDACTED]” (*Id.*) The second attachment, entitled “[REDACTED],” was a revision of the
 7 document Mayder sent two days earlier, and was intended as an appendix [REDACTED]. *Id.* The
 8 properties windows for both documents show they were Agilent documents. (Pochowski Decl.,
 9 August 22, 2007, ¶¶9, 18-20, Ex. I, J.) A comparison of the “[REDACTED]” with
 10 Verigy’s “[REDACTED]” (which Mayder worked on at Verigy) shows the two
 11 documents with identical layouts, section headings, information structure, and typographical errors.
 12 (*Cf.* Lee Decl., ¶6, Ex. A *with* Pochowski Decl., Aug. 22, 2007, ¶9, Ex. B; see also, Morton Decl.,
 13 Aug. 22, 2007, ¶5, Ex. C (a redline comparison of the two documents).) Mayder has admitted using
 14 the [REDACTED] documents as a basis for the Picasso documents, explaining that “[REDACTED]
 15 [REDACTED] (Declaration of Melinda M. Morton In Support of Plaintiff’s Reply and Supplemental Brief
 16 re OSC, etc. (“Morton Decl., Nov. 16, 2007”) (Docket No. 98), ¶4, Ex. 2 (Romi Mayder Depo. Tr.
 17 185:7-15).)

18 On June 20, 2006, during his work day at Verigy, Romi Mayder emailed the [REDACTED]
 19 [REDACTED] sales representative.
 20 (Pochowski Decl., Aug. 22, 2007, ¶ 10, Ex. C.)

21 On June 22, 2006, Romi Mayder informed [REDACTED]
 22 that he planned to leave Verigy [REDACTED]. (Morton Decl., Aug.
 23 15, 2008, ¶ 7, Ex. D (Ex. 193 to Straube Depo.Tr.))

24 On June 26, 2006, Romi Mayder emailed to Pochowski Verigy documents including a
 25 spreadsheet containing detailed confidential customer requirements and block diagrams of customer
 26 device requirements. (Pochowski Decl., August 22, 2007, ¶ 11, Ex. D) Romi Mayder has admitted
 27 the spreadsheet is a Verigy document. (Morton Decl., ¶2, Ex. A (Mayder Depo Tr. 223:14-224:15).)
 28 His admission is confirmed by the document’s properties window, which show the author of the

document to be Hanh Lai of Agilent. (Pochowski Decl., August 22, 2007, ¶21, Ex. K.). Further, the spreadsheet has the same typographical errors as the original Verigy document, and the diagrams appear to be identical to confidential documents created at Verigy. (Cf. Pochowski Decl., August 22, 2007, Ex. D *with* Declaration of Ken Hanh Duc Lai In Support of Plaintiff's Ex Parte Application for TRO, etc. (Docket No. 7) ("Lai Decl., Aug. 22, 2007") Ex. A; *see also*, Lai Decl., Aug. 22, 2007, ¶¶3-7, Ex. B-D; Declaration of Ken Hanh Duc Lai In Support of Plaintiff's Reply and Supplemental Brief Re OSC Re Preliminary Injunction (Docket No. 100) ("Lai Decl., Nov. 16, 2007") ¶¶2-4.)

On June 30, 2006, Mayder emailed his official [REDACTED] (Morton Decl., Aug. 15, 2008, ¶ 6, Ex. C. (Exhibits 149, 150 to Straube Depo. Tr.) Mayder admits speaking with Honeywell before leaving Verigy "[REDACTED] [REDACTED]." (Mayder Decl., October 11, 2007, ¶38.)

On August 6, 2006, Romi Mayder emailed confidential [REDACTED] [REDACTED] to Pochowski. (Pochowski Decl. in support of Plaintiff's Reply and Supplemental Papers re: Preliminary Injunction (Docket No. 97) ("Pochowski Decl., November 16, 2007") ¶ 8, Ex. 1); Lai Decl., November 16, 2007, ¶¶5-6, Ex. 3 and 4; Morton Decl., ¶¶ 2, 5, Ex. A (Romi Mayder Depo.Tr. at 232:15-234:7) and Ex. D (Romi Mayder Depo. Exhibit 33)

On at least two of these occasions (June 26 and August 6, 2006), Romi Mayder emailed documents to Pochowski without even bothering to make any changes to hide the fact that they were Verigy documents. (Pochowski Decl., August 22, 2007, ¶ 11, Ex. D; Pochowski Decl., November 16, 2007, ¶ 8, Ex. 1.)

D. Mayder Attempts to Conceal His Actions

Patent Application. On August 27, 2006, Mayder emailed Pochowski a draft patent application, stating, [REDACTED]

[REDACTED] (Pochowski Decl., Aug. 22, 2007, ¶13, Ex. F.) The attached draft is entitled "[REDACTED]" (*Id.*)

1 On September 24, 2006, Mayder emailed Pochowski about their upcoming meeting [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]” (*Id.*) In fact, the disclosure Mayder and Pochowski presented to patent counsel on
 5 September 25, 2006 was an update of the disclosure Mayder wrote and sent to Pochowski on August
 6 27, 2006. (*Id.*)

7 **NDA with Honeywell.** On September 18, 2006, as part of ongoing negotiations with STS, a
 8 Honeywell representative sent a form of nondisclosure agreement to Pochowski. (Pochowski Decl.,
 9 Aug. 22, 2007, ¶15, Ex. H, p. 2.) Revised drafts were exchanged between Pochowski and
 10 Honeywell. (*Id.*) On September 20, 2006, while he was still a Verigy employee, Mayder emailed
 11 Pochowski about the nondisclosure agreement, stating, “[REDACTED]
 12 [REDACTED].” (*Id.*)

13 **E. Verigy Discovers Mayder’s Actions**

14 In or about July 2007, Verigy discovered that during the last three months of his
 15 employment, Romi Mayder had been emailing Verigy information to himself and others. (Verigy’s
 16 Brief in Support of Ex Parte Application (Docket No. 16), at pp. 13-14 and citations to declarations
 17 contained therein.) Verigy responded by conducting an investigation that included the retention of
 18 counsel and a computer expert, for the purposes of determining the scope of Mayder’s theft. (*Id.*;
 19 Morton Decl., Aug. 15, 2008, ¶¶ 3-4.) The Court also appointed a neutral, third party expert to
 20 examine Romi Mayder’s computers to determine which Verigy documents he had transferred there,
 21 and the costs to Verigy of that investigation alone exceeded \$17,000. (Morton Decl., Aug. 15, 2008,
 22 ¶ 4, Ex. A.).

23 **III. ARGUMENT**

24 Rule 56 of the Federal Rules of Civil Procedure provides for summary judgment when “the
 25 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
 26 affidavits, if any, show that there is no genuine issue as to any material fact and that the moving
 27 party is entitled to judgment as a matter of law.” Material facts are those that might affect the
 28 outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A dispute as to

1 a material fact is “genuine” if there is sufficient evidence for a reasonable jury to return a verdict for
2 the nonmoving party. *Id.*

3 As the moving party, Verigy bears the initial burden of identifying evidence showing the
4 absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).
5 Once it has done so, the burden shifts to Defendants to set forth specific facts showing a genuine
6 issue. *Anderson*, 477 U.S. at 250.

7 The same standards and criteria apply to motions for summary adjudication. *State of Cal.,*
8 *on Behalf of California Dept. of Toxic Substances Control v. Campbell*, 138 F.3d 772, 780 (9th Cir.
9 1998). Summary adjudication may be rendered on the issue of liability, even if a genuine issue
10 exists as to the amount of damages. *Fed. R. Civ. Pro. Rule 56(d)(2)*.

11 Verigy moves for summary adjudication of its third and eighth claims on the issue of
12 liability. The Eighth claim against Mayder for breach his duty of of loyalty is discussed first,
13 because the argument is also relevant to the third claim for breach of the Computer Fraud and Abuse
14 Act.

15 **A. Verigy Is Entitled to Summary Adjudication of Its Eighth Claim For Relief**
16 **Against Mayder For Breach of the Duty of Loyalty.**

17 **1. As A Verigy Employee, Mayder Owed Verigy A Duty Of Loyalty.**

18 “The elements of a cause of action for breach of a duty of loyalty, by analogy to a claim for
19 breach of fiduciary duty, are as follows: (1) the existence of a relationship giving rise to a duty of
20 loyalty; (2) one or more breaches of that duty; and (3) damage proximately caused by that breach.”
21 *Huong Que, Inc. v. Luu*, 150 Cal. App. 4th 400, (2007), *citing Pierce v. Lyman*, 1 Cal. App. 4th
22 1093, 1101 (1991).

23 A duty of loyalty is owed by all employees, regardless of their stature within the company.
24 *See Huong Que, Inc.*, 150 Cal. App. 4th at 414; *Otsuka v. Polo Ralph Lauren Corp*, No. C07-02780
25 SI, 2007 WL 3342721, at * 3 (N.D. Cal. Nov. 9, 2007).

26 Here, it is *undisputed* that Romi Mayder was an employee of Verigy from June 1, 2006,
27 through September 21, 2006. (Guerzoni Decl., ¶¶2, 3; Declaration of Romi Mayder submitted in
28 support of Defendants’ Motion for Summary Adjudication on Verigy’s 3rd-5th Claims for Relief

(Docket No. 279), (“Mayder Decl., July 28, 2008”) ¶ 7.) Accordingly, as a matter of law, Romi Mayder owed Verigy a duty of loyalty during his tenure as a Verigy employee.

2. Mayder Breached His Duty Of Loyalty To Verigy.

“The duty of loyalty is breached, and may give rise to a cause of action in the employer, when the employee takes action which is inimical to the best interests of the employer.” *Stokes v. Dole Nut Co.*, 41 Cal. App. 4th 285, 295 (1995); *see also* Cal. Labor Code § 2860 (“Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment”); *id.*, § 2863 (“An employee who has any business to transact on his own account, similar to that entrusted to him by his employer, shall always give the preference to the business of the employer.”).

Romi Mayder’s undisputed actions, consisting of establishing the STS entities to continue developing the very product he was developing on behalf of Verigy and developing this product using Verigy documents and information all while still continuing to work at Verigy, constitute a breach of his duty of loyalty to Verigy. It cannot be disputed that these actions were “inimical to the best interests of” Verigy, particularly where Verigy had chosen not to continue its development of the [REDACTED] due to concerns that this [REDACTED]. *Stokes, supra*, 41 Cal. App. 4th at 295.

The following facts regarding Mayder’s conduct are not genuinely disputed:

- As a condition of his employment with Verigy, Romi Mayder was required to sign, and did sign, the ARCIPD, which provided Mayder was not authorized at any time to use or disclose confidential Verigy information, that Verigy had the sole right to disseminate all work performed by him, and that Romi Mayder was not authorized to remove Verigy property from its premises without Verigy’s permission (Guerzoni Decl., ¶3, Ex. B.)
- In early June 2006, Mayder contacted Pochowski about the possibility of forming a business together. (Mayder Decl., October 11, 2007, ¶¶23, 28; Pochowski Decl., Aug. 22, 2007, ¶ 4.)
- On June 8, 2006, Mayder met with Pochowski and asked him to invest in STS. (Pochowski Declaration, August 22, 2007, ¶¶4-6.)
- On June 15, 2006, Mayder registered the domain name “silicontest.com” with Network Solutions for his new company. Mayder was the administrator for the website. (Morton Decl., Aug. 22, 2007, ¶3, Ex. A.); Mayder Decl., October 11, 2007, ¶32.)

- 1
- 2 • On September 8, 2006, Silicon Test Solutions, LLC was registered with the
- 3 California Secretary of State. (Morton Decl., Aug. 22, 2007, ¶7, Ex. D.)
- 4 • In early June 2006, Romi Ma [REDACTED]
- 5 home computer, including [REDACTED]
- 6 [REDACTED] using his Yahoo email account to cover up his activities.
- 7 (Morton Decl., ¶2-3, Ex. A (Romi Mayder Depo.Tr., 211-213; 215-221) and
- 8 Ex. B (Romi Mayder Depo. Ex. 29); Lee Decl., ¶ 6, Ex. A); Morton Decl.,
- 9 August 22, 2007, ¶4, Ex. B and C; Pochowski Decl., August 22, 2007, ¶¶19-
- 20 20, Ex. I and J.
- 21 • Mayder slightly revised the Verigy [REDACTED] and specification,
- 22 performing a global search and replace t [REDACTED], with “Silicon Test
- 23 Solutions. (Morton Decl., ¶ 2, Ex. A (Romi Mayder Depo.Tr., at 215:16-
- 24 217:16; 218:14-221:5) and Ex. C (Romi Mayder Depo Ex. 30.)
- 25 • On June 12, 2006, during his work day for Verigy, Romi Mayder emailed the
- 26 altered specification to Pochowski, without benefit of a nondisclosure
- 27 agreement, from his private email account at [REDACTED].
- 28 (Mayder Decl., October 11, 2007, ¶28; Morton Decl., ¶2, Ex. A (Romi Mayder
- Depo.Tr., at 211:6-12) and Ex. B (Romi Mayder Depo. Ex. 29); Pochowski
- Decl., August 22, 2007, ¶ 7, Ex. A.) Mayder described the document as a first
- draft of an [REDACTED], a potential supplier to STS.
- (*Id.*) The properties window for the RFQ Mayder sent to Pochowski shows it
- was an Agilent document. (Pochowski Decl., August 22, 2007, ¶18, 19, Ex. I.)
- The document is virtually identical to a document Mayder created for Verigy.
- (*Cf.* Pochowski Decl., August 22, 2007, Ex. A with Lee Decl., August 22,
- 2007, Ex. A; *see also* Morton Decl., August 22, 2007, ¶4, Ex. B (a redline
- comparison of the two documents).) The documents even have the same
- typographical and grammatical errors. (Morton Decl., August 22, 2007, ¶4.)
- On June 14, 2006, during his work day for Verigy, Mayder sent
- email attaching two documents he described as the RFQ for the [REDACTED]
- and an updated version of the technical data sheet Mayder previously sent
- Pochowski, and asked him to send them [REDACTED] (Pochowski Decl., Aug.
- 22, 2007, ¶9, Ex. B.) The first attachment was entitled “[REDACTED]
- [REDACTED] (*Id.*) The second attachment, entitled “[REDACTED], was a
- revision of the document Mayder sent two days earlier, and was intended as an
- appendix to the RFQ. *Id.* The properties windows for both documents show
- they were Agilent documents. (Pochowski Decl., August 22, 2007, ¶¶9, 18-20,
- Ex. I, J.) A comparison of the “[REDACTED]” with Verigy’s
- “[REDACTED]” (which Mayder worked on at Verigy) shows
- the two documents with identical layouts, section headings, information
- structure, and typographical errors. (*Cf.* Lee Decl., ¶6, Ex. A with Pochowski
- Decl., Aug. 22, 2007, ¶9, Ex. B; *see also*, Morton Decl., Aug. 22, 2007, ¶5, Ex.
- C (a redline comparison of the two documents).) Mayder has admitted using
- the [REDACTED] as a basis for the [REDACTED], explaining
- that [REDACTED] Morton Decl., Nov. 16, 2007, ¶4, Ex. 2 (Romi
- Mayder Depo. Tr. 185:7-15).)
- On June 20, 2006, during his work day at [REDACTED]
- and updated technical specification for the [REDACTED]
- sales representative. (Pochowski Decl., Aug. 22, 2007, ¶ 10, Ex. C.)

- 1 • [REDACTED] 2006, Mayder informed [REDACTED]
2 [REDACTED] that Mayder planned to [REDACTED]
3 [REDACTED]. (Morton Decl., Aug. 15, 2008, ¶ 7, Ex. D (Ex. 193 to
Straube Depo.Tr.))
- 4 • On June 26, 2006, Mayder emailed to Pochowski Verigy documents including
5 a spreadsheet containing detailed confidential customer requirements and
6 block diagrams of customer device requirements. (Pochowski Decl., August
7 22, 2007, ¶ 11, Ex. D) These documents appear to be identical to confidential
8 documents created at Verigy; the spreadsheet has the same typographical
9 errors as the original Verigy document. (Cf. Pochowski Decl., August 22,
10 2007, Ex. D with Lai Decl., Aug. 22, 2007, Ex. A; see also, Lai Decl., Aug. 22,
11 2007, ¶¶3-7, Ex. B-D; Lai Decl., Nov. 14, 2007, ¶¶2-4.)
- 12 • On June 30, 2006, Mayder emailed his official [REDACTED]
13 (Morton Decl., Aug. 15, 2008, ¶ 6, Ex. C. (Stra
14 Mayder admits speaking with Honeywell before leaving Verigy “ [REDACTED]
15 [REDACTED] (Mayder Decl., October 11, 2007, ¶38.)
- 16 • [REDACTED] tial Verigy [REDACTED]
17 [REDACTED] to Pochow
18 Decl., November 16, 2007) ¶ 8, Ex. 1); Lai Decl., November 16, 2007, ¶¶5-6,
19 Ex. 3 and 4; Morton Decl., ¶¶ 2, 5, Ex. A (Romi Mayder Depo.Tr. at 232:15-
20 234:7) and Ex. D (Romi Mayder Depo. Exhibit 33).)
- 21 • On Aug
22 stating, [REDACTED]
23 [REDACTED]
24 [REDACTED] (Pochowski Decl., Aug. 22, 2007, ¶13, Ex. F.)
25 The attached draft is entitled “Patent Application-Romi Mayder, Bob
26 Pochowski” (*Id.*)
- 27 • On September 24, 2006, Mayder emailed Pochowski about their upcoming
meeting with patent counsel. (*Id.*, ¶14, Ex. G.) In this email, Mayder reminds
Pochowski that they should “ [REDACTED]
[REDACTED] (*Id.*)
- On September 18, 2006, as part of ongoing negotiations with STS, a
Honeywell representative sent a form of nondisclosure agreement to
Pochowski. (Pochowski Decl., Aug. 22, 2007, ¶15, Ex. H, p.2.) Revised
drafts were exchanged between Pochowski and Honeywell. (*Id.*) On
September 20, 2006, while he was still a Verigy employee, Mayder emailed
Pochowski about the nondisclosure agreement, stating, “ [REDACTED]
[REDACTED]

In similar cases involving an employee taking steps to establish a competing business

1 venture while still employed, courts have found that the duty of loyalty, or a fiduciary duty, was
 2 breached. See *Huong Que, Inc.*, 150 Cal. App. 4th 400 (former employer likely to prevail on breach
 3 of duty of loyalty claim and therefore entitled to a preliminary injunction based on evidence that
 4 defendants had misappropriated corporation's customer list and used it to solicit business for a
 5 competing business); *Iconix, Inc. v. Tokuda*, 457 F.Supp.2d 969 (N.D. Cal. 2006) (former employer
 6 likely to prevail on breach of fiduciary duty claim and therefore entitled to a preliminary injunction
 7 based on evidence that employees secretly formed their own competing company, registered a
 8 domain name for that company, and worked on developing the product for that company, all while
 9 still working for the former employer); see *Stokes*, 41 Cal. App. 4th 285 (granting summary
 10 judgment in favor of employer on employees' claims of wrongful discharge where employees were
 11 fired for establishing a competing business, including pursuing financing for the new business and
 12 creating and submitting detailed business proposals for the new company while still working for the
 13 employer); *Fowler v. Varian Associates, Inc.*, 196 Cal.App.3d 34 (1987) (holding employee had
 14 violated his duty of loyalty to employer as a matter of law where employee participated in the
 15 formation of competing business by attending some meetings, providing ideas or suggestions,
 16 assisting in efforts to obtain financing, and considering becoming a partner in the new business
 17 while still employed).

18 Mayder may contend that he was *not* establishing a competing business venture or taking
 19 actions inimical to the best interest of Verigy because Verigy chose to shelve the [REDACTED]
 20 [REDACTED] However, it is undisputed that Verigy made this decision based in part on concerns that the
 21 product [REDACTED] (Declaration of Kevin
 22 Pasquinelli in Response to Order to Show Cause (Docket No. 54) ("Pasquinelli Decl.") ¶12, Ex. K
 23 (Leventhal Depo.Tr., 27:24-29:9) and H.) Thus, Mayder cannot genuinely dispute that the
 24 anticipated STS device would be competitive with Verigy's products in the broad sense and,
 25 therefore, that his actions in establishing the STS entities to continue development of this product
 26 while still working at Verigy, using Verigy's information and data, were against Verigy's best
 27 interest. See *Fowler*, 196 Cal.App.3d at 42 (employee breached duty of loyalty as a matter of law
 28 where employee was involved in a new business to create a product which would be "a reasonable

1 or viable alternative” to plaintiff’s products and competitive with plaintiff’s products “in the
2 broadest sense”).

3 Romi Mayder’s substantial activities on the part of the STS entities, including, but not
4 limited to, registering a domain name, soliciting investors, taking Verigy’s document, seeking
5 suppliers, developing the STS device, working on a patent disclosure which was filed only six (6)
6 days after Romi Mayder’s last day of work at Verigy, and even incorporating Silicon Test Solutions
7 LLC, all while still working at Verigy, went beyond mere preparations to compete. Far less has been
8 found to constitute a breach of the duty of loyalty. *See id.* (breach of duty of loyalty where employee
9 participated in the formation of competing business by attending some meetings, providing ideas or
10 suggestions, assisting in efforts to obtain financing, and considering becoming a partner in the new
11 business while still employed). Romi Mayder’s actions herein demonstrate unequivocally that his
12 loyalty was with the STS entities, not with Verigy, and that he was working to promote his personal
13 interests while still employed by Verigy.

14 Because the undisputed facts establish that Romi Mayder breached his duty of loyalty to
15 Verigy, Verigy is entitled to summary adjudication on its Eighth claim for relief.

16 **3. Verigy Suffered Damages As A Result Of Mayder’s Breach.**

17 Mayder’s breach of his duty of loyalty caused damage to Verigy, including, but not limited
18 to, the salary and benefits paid to Mayder while he was working on his competing venture and, at
19 the same time, ostensibly remaining an employee of Verigy. Verigy is entitled to recover the
20 amounts paid to Mayder while he was competing with Verigy. *See, e.g., Service Employees Intern.*
21 *Union, Local 250 v. Colcord*, 160 Cal. App. 4th 362 (2008) (in action for breach of fiduciary duty,
22 fraud, and unfair competition, employer was entitled to damages award consisting of salary and
23 benefits paid to former employee during time in which employee was secretly competing with the
24 employer).

25 The law is clear that disgorgement of salary and benefits is an appropriate remedy where an
26 employee violates the duty of loyalty owed to the employer.

27 [The employee] supported himself with compensation received from [the
28 employer] while he plotted against its interests. Had he resigned as soon as he
embarked on competition with [his employer], or had he honored his fiduciary

1 duty to [his employer] by disclosing defendants' activities, the [employer] would
 2 not have continued to pay him. Thus, as the trial court observed, defendants'
 3 "salaries and benefits are damages directly flowing from the breach of defendants'
 4 fiduciary duties." Although [the employer] might have had to incur the cost of
 5 paying similar salary and benefits to a replacement employee . . . , it would have
 6 had that replacement's undivided loyalty in return. [The employee's] conduct
 7 deprived the [employer] of that vital benefit.

8 *Service Employees Intern. Union*, 160 Cal.App.4th at 371.

9 It is undisputed that Mayder began establishing the STS entities and working on their behalf
 10 in early June 2006. Accordingly, a minimum, Verigy is entitled to recover the salary and benefits
 11 paid to Mayder from June 2006 through the date of his resignation..

12 Because Verigy has established each element of its claim for breach of duty of loyalty, the
 13 Court should enter summary adjudication in Verigy's favor with respect to its Eighth claim for
 14 relief.

15 **B. Verigy Is Entitled To Summary Adjudication Of Its Third Claim For Relief For**
 16 **Violation Of The Computer Fraud And Abuse Act.**

17 To establish a CFAA claim, a plaintiff must prove defendant "(1) intentionally accessed (2) a
 18 protected computer (3) without authorization, and (4) as a result of such conduct, has (5)
 19 intentionally, recklessly or otherwise caused (6) damage." *ViChip Corp. v. Lee*, 438 F. Supp. 2d
 20 1087, 1100 (N.D. Cal. 2006), *citing*, CFAA, 18 U.S.C. §§ 1030(a)(5)(A-B).

21 **1. Romi Mayder Intentionally Accessed a Protected Computer**

22 In their pending motion for summary adjudication of Verigy's Third Claim for Relief for
 23 violation of the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. §1030 *et seq.*, Defendants
 24 implicitly concede the existence of four of the six elements, challenging only the "without
 25 authorization" and "damage" elements. Even if Defendants were to dispute the other elements, the
 26 dispute would not be genuine. There can be no genuine dispute that Mayder intentionally accessed a
 27 "protected computer." Verigy's file server and Mayder's Verigy-issued computer are "protected"
 28 because they are "used in interstate or foreign commerce or communication." 18 U.S.C.
 §1030(e)(2)(B); *see also*, *United States v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007) (because the

internet is an instrumentality of interstate commerce, computers connected to the internet are “protected computers”).

Mayder has admitted he accessed Verigy documents that were on his work computer and emailed them to his home computer. (Morton Decl., ¶2, Ex. A (Mayder Depo Tr. 212:1-213:24).) It cannot be genuinely disputed that he did so to advance his personal interests and not those of Verigy. Specifically:

- Romi Mayder admits he emailed Verigy documents to his home computer, using his Yahoo email account. (Morton Decl., ¶¶ 2-3, Ex. A (Romi Mayder Depo.Tr., 211-213) and Ex. B (Romi Mayder Depo. Ex. 29).)
- [REDACTED] himself were the [REDACTED]. (*Id.* and at Ex. Mayder Depo Tr., 211-213; 215-221); Lee Decl., ¶ 6, Ex. A; Morton Decl., August 22, 2007, ¶4, Ex. B and C; Pochowski Decl., August 22, 2007, ¶¶19-20, Ex. I and J.)

Mayder also admits that he then emailed Verigy documents to Pochowski (Morton Decl., Ex. A (Mayder Depo Tr. 223:14-224:15; 232:15-233:5), D, E.) In at least two cases, Mayder made no changes to the documents before sending them to Pochowski:

- On June 26, 2006, Mayder emailed Verigy documents containing detailed confidential customer requirements and pinouts to Pochowski. (Pochowski Decl, August 22, 2007, ¶ 11, Ex. D.)
- [REDACTED] Verigy [REDACTED] to Poch [REDACTED] November 16, 2007 ¶ 8, Ex. 1); Lai Decl., November 16, 2007, ¶¶5-6, Ex. 3 and 4; Morton Decl., ¶¶ 2, 5, Ex. A (Romi Mayder Depo.Tr. at 232:15-234:7) and Ex. D (Romi Mayder Depo. Exhibit 33).)

It cannot be genuinely disputed that Mayder accessed Verigy computers to obtain these documents.¹

2. Romi Mayder’s Access Was Without Authorization.

An employee who breaches his duty of loyalty to the company automatically loses his “authorization” to access the company’s computers. See *ViChip*, 438 F. Supp. 2d at 1100; see also, *Int’l Airport Ctrs., L.L.C. v. Citrin*, 440 F.3d 418, 420-421 (7th Cir. 2006).

¹ Although the information that Mayder accessed does not need to be confidential for liability to attach, all of the documents Mayder improperly accessed meet the definition of “Confidential information” in the ARCPD (“information on research and development” and were either explicitly marked confidential or rough drafts of documents that were inserted into documents marked confidential. See Verigy’s Opposition to Defendants’ Motion for Summary Adjudication on Third through Fifth Claims, p. 4, fn. 1&2.

1 In *ViChip*, a decision emanating from this District, defendant former employee argued (as do
 2 Defendants here) that because he accessed and deleted company computer files while still an officer
 3 and director of plaintiff company, he was legally “authorized” to do so. See, *ViChip*, 438 F. Supp.
 4 2d at 1100. Judge Phyllis Hamilton disagreed, finding that when defendant decided to delete all
 5 information from his employer’s server and computer, knowing that he was going to be asked to
 6 step down from his CEO position, he breached his duty of loyalty to the company and automatically
 7 terminated his agency relationship to the company. “In doing so, and as the *Citrin* court held, he
 8 also terminated his authorization to access the files.” *Id.*

9 Similarly, in *Citrin*, a Seventh Circuit decision authored by Judge Richard Posner and relied
 10 on by Judge Hamilton in *ViChip*, defendant former employee, after deciding to leave his job but
 11 while still employed by plaintiff employer, accessed his work-issued computer and deleted work-
 12 related data and other information that revealed his prior improper conduct. The *Citrin* court, citing
 13 *United States v. Galindo*, 871 F.2d 99, 101 (9th Cir. 1989) and *Shurgard Storage Centers, Inc. v.*
 14 *Safeguard Self Storage, Inc.*, 119 F. Supp. 2d 1121, 1124-25 (W.D. Wash. 2000), held that
 15 defendant’s authorization to access the laptop terminated when he decided to destroy the files “in
 16 violation of the duty of loyalty that agency law imposes on an employee.” See, *Citrin*, 440 F.3d at
 17 420. Judge Posner opined:

18 Citrin’s breach of his duty of loyalty terminated his agency relationship (more
 19 precisely, terminated any rights he might have claimed as IAC’s agent--he could
 20 not by unilaterally terminating any duties he owed his principal gain an
 advantage!) and with it his authority to access the laptop, because the only basis
 of his authority had been that relationship.

21 *Id.* at 420-421.

22 Similarly, in *Charles Schwab & Co., Inc. v. Carter*, No. 04 C 7071, 2005 WL 351929 (N.D.
 23 Ill. Feb. 11, 2005), the court determined that plaintiff employer had stated a claim for violation of
 24 the CFAA based on allegations that an employee accessed and copied proprietary information
 25 during his employment with plaintiff and sent it to a third party. Defendants in *Charles Schwab*,
 26 like Defendants herein, argued that the CFAA was primarily designed to be an anti-hacking statute.
 27 *Id.* at *3. The court rejected this argument, stating:

28 although Defendants argue that the statute should be narrowly construed as an

1 “anti-hacking” statute, they do not explain why [the employee’s] unauthorized
 2 access to Schwab’s confidential information on its computer system and
 3 distribution of this information is not “hacking.” Indeed, several district courts
 4 have recognized that damage caused by unauthorized access or access in excess of
 5 authorization to a computer system may be redressed under the CFAA.

6 //

7 *Id.* Decisions from other district courts around the country are in accord.²

8 Here, as in *ViChip*, *Citrin*, and *Charles Schwab*, Mayder’s employee status during the time
 9 he accessed and transferred information from Verigy’s computers and servers in breach of his duty
 10 of loyalty does not constitute “authorization” for his actions. Mayder’s authorization terminated
 11 when he first breached his duty of loyalty to Verigy, as discussed above in Section IV(A). The
 12 breach of loyalty automatically terminated Romi Mayder’s authorization to access Verigy’s
 13 computers. His subsequent access for the purpose of furthering his own business was “without
 14 authorization” and actionable under the CFAA. Further, pursuant to the ARCIPD, Romi Mayder
 15 was not authorized at any time to use or disclose confidential Verigy information, or to remove
 16 Verigy property from its premises without Verigy’s permission. (*See*, Guerzoni Decl., ¶3, Ex. B
 17 (ARCIPD), ¶¶ 1 & 4.) Romi Mayder’s accessing of Verigy’s computers for improper purposes
 18 under the ARCIPD at any time cannot be deemed authorized. *See*, *Hewlett-Packard Co. v. Byd:*
 19 *Sign, Inc.*, No. 6:05 CV 456, 2007 WL 275476, at *12-*13 (E.D.Tex. Jan. 25, 2007) (CFAA claim
 20 stated against employees prohibited by agreement from accessing or sending messages on company
 21 computer systems for personal gain). Further, Mayder was never authorized to access Verigy’s
 22 computers for any purpose other than furthering Verigy’s business. *See*, Price Decl., ¶2, Ex. A
 23 (access granted solely to facilitate work for Verigy.)

24 ² *E.g.*, *Pacific Aerospace & Electronics, Inc. v. Taylor*, 295 F. Supp. 2d 1188, 1196 (E.D. Wash.
 25 2003) (“[e]mployers . . . are increasingly taking advantage of the CFAA’s civil remedies to sue
 26 former employees and their new companies who seek a competitive edge through wrongful use of
 27 information from the former employer’s computer system”); *See*, *Shurgard Storage Centers, Inc.*,
 28 119 F.Supp.2d at 1125 (employees’ access was no longer authorized when they became agents of
 the company’s competitor and took the information for the benefit of the competitor; employees
 “lost their authorization and were ‘without authorization’ when they allegedly obtained and sent the
 proprietary information to the defendant via e-mail”).

//

Even Romi Mayder admits his authorization to access Verigy's information was limited. Mayder declares that, during his employment with Verigy and its predecessors from 1998 until September 21, 2006, "I was granted access to, and in fact was required to access, the computer systems and computer information of the companies' [sic] *in order to carry out my job responsibilities.*" (Romi Mayder Decl., July 28, 2008, ¶ 7) (emphasis added). Verigy does not dispute that Mayder was authorized to access its computer systems and information *in order to carry out his job responsibilities.* His actions, however, were anathema to those responsibilities. As shown above, beginning in early June, 2006, Romi Mayder repeatedly accessed Verigy's computer systems to email himself and others Verigy documents and information for the purpose of setting up his own business. These acts were performed for the benefit of Romi Mayder and the other defendants, and not for the purpose of carrying out Mayder's Verigy job responsibilities.

Because as a matter of law Romi Mayder's access to Verigy's computers was, at all relevant times, *not* authorized within the meaning of the CFAA, Verigy's motion for summary adjudication of its Third Claim for Relief under the CFAA should be granted.

3. Verigy Has Sustained "Loss" Within The Meaning Of The CFAA As a Matter of Law and Undisputed Fact.

The CFAA permits a civil action to be brought by "any person who suffers damage or loss by reason of a violation of this section . . . if the conduct involves one of the factors set forth in clause (i), (ii), (iii), (iv), *or* (v) of subsection (a)(5)(B)." 18 U.S.C. §1030(g) (emphasis added). Clause (i) of subsection (a)(5)(B) describes a factor of "loss to 1 or more persons during any 1-year period . . . aggregating at least \$5,000 in value." 18 U.S.C. §1030(a)(5)(B)(i). The CFAA defines "loss" as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." 18 U.S.C. §1030(e)(11).

The statutory definition of "loss," on its face, encompasses "any reasonable cost to any victim," which includes much more than just the cost of restoring data or cost due to interruption of service. "Loss" under the CFAA has been interpreted broadly and includes, for example any loss of

1 business and business goodwill, *Creative Computing v. Getloaded.com LLC*, 386 F.3d 930, 935 (9th
 2 Cir. 2004); loss of license fees, *Therapeutic Research Faculty v. NBTY, Inc.*, 488 F. Supp. 2d 991,
 3 996-97 (E.D. Cal. 2007); and investigating and taking remedial steps to prevent recurrence, *P.C. of*
 4 *Yonkers, Inc. v. Celebrations! The Party And Seasonal Superstore, L.L.C.*, No. CIV. A. 04-4554
 5 JAG, 2007 WL 708978, at *5 (D.N.J. Mar. 5, 2007). “Loss” does not require damage to the
 6 computer itself. See, *Therapeutic Research Faculty*, 488 F. Supp. 2d at 996-97; see also, *Charles*
 7 *Schwab & Co*, 2005 WL 351929, at *3 (unauthorized copying of material from plaintiff’s computer
 8 and delivery to a third party states a claim under CFAA).

9 Here, Verigy has been damaged by Romi Mayder’s unauthorized accessing of a protected
 10 computer in amounts exceeding \$5,000. (See, Morton Decl., Aug. 15, 2008, ¶¶ 3-4, Ex. A.) When
 11 Verigy discovered that, during the last three months of his employment, Mayder had been emailing
 12 Verigy information to himself and others, it responded by conducting an investigation that included
 13 the retention of counsel and a computer expert, for the purposes of determining the scope of
 14 Mayder’s theft. The Court also appointed a neutral, third party expert to examine Romi Mayder’s
 15 computers to determine which Verigy documents he had transferred there, and the costs of that
 16 investigation alone exceeded \$17,000. (*Id.*, ¶ 4, Ex. A.)

17 [I]n cases like this, where the offense involves unauthorized access and the use of
 18 protected information, the reasonable “cost of responding to [the] offense” ... will
 19 be different from such cost in a case where the primary concern is the damage to
 20 the plaintiff’s computer system itself.’ *SuccessFactors, Inc. v. Softscape, Inc.*, ---
 21 F.Supp.2d ---, No. 08-1376, 2008 WL 906420, at *5 (N.D.Cal. Apr. 1, 2008).
 22 ‘[W]here the offender has actually accessed protected information, discovering
 23 who has that information and what information he or she has is essential to
 24 remedying the harm.’ *Id.* Thus, the cost of discovering the identity of the
 25 offender and the method by which the offender accessed the protected
 26 information, as well as the ‘many hours of valuable time away from day-to-day
 27 responsibilities’ required to reasonably respond to the unauthorized access, may
 28 all be considered part of the loss for purposes of the CFAA.

24 *Contract Associates Office Interiors, Inc. v. Ruiter*, No. CIV S07-0334 WBS EFB, 2008 WL
 25 3286798 (E.D. Cal. Aug. 6, 2008), at *4. Clearly, Verigy has suffered a “loss” within the meaning
 26 of the CFAA.

27 Because, as shown, all of the elements of a CFAA claim against Romi Mayder are satisfied,
 28 Verigy is entitled to summary adjudication of its third claim for relief.

1 **IV. CONCLUSION**

2 For the foregoing reasons, Verigy's motion for summary adjudication of its third and eighth
3 claims for relief should be granted.

4 Dated: August 29, 2008

BERGESON, LLP

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6 By: /s/
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7 Attorneys for Plaintiff
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